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No. 91-1617

IN THE

United States Supreme Court

October Term, 1991

WILLIAM C. HULS AND
MARSDEN W. MILLER, JR.,
Petitioners

VERSUS

UNITED STATES OF AMERICA,
Respondent

**On Petition for Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit**

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

The government argues, as it did below, that this is merely a routine "defective indictment" case, and that petitioners' double jeopardy claims therefore fail under an "unbroken line of precedent" permitting retrial where a conviction is reversed for procedural error. The Fifth Circuit rejected the government's analysis, admitted that the defendants' position was supported by well established appellate authority, but ultimately ruled against petitioners solely because it felt compelled to do so by the holding in *Richardson v. United States*, 468 U.S. 317 (1984). The government's opposition misstates the relevant law, and we file this reply brief to set the record straight.

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE FOUR-WAY CIRCUIT SPLIT ON WHETHER, EVEN IF THE EVIDENCE WAS INSUFFICIENT AT HIS INITIAL TRIAL, A DEFENDANT FOREVER LOSES HIS RIGHT TO DOUBLE JEOPARDY PROTECTION IF HIS CONVICTION IS REVERSED ON OTHER GROUNDS

The government misstates the first issue by framing the question as whether petitioners are entitled to a review of the "suffi-

ciency of the evidence at their first trial under the theory charged in petitioners' second indictment." Petitioners are now charged for the exact same conduct with the exact same crime — mail fraud — as they were at the first trial. What petitioners seek is a review of the sufficiency of the evidence at trial to support a conviction for mail fraud — on *any* valid mail fraud "theory."

A prosecutorial "theory" is nothing more than a plan or method for proving a set of facts believed by the prosecution to constitute a criminal offense.[1] Here, the prosecutors "theorized" that they could prove mail fraud without putting on any evidence of a property deprivation. They were wrong. Thus, at petitioners' trial the government proved a set of facts that did not constitute mail fraud or any other crime. For its own reasons and by its own choice, the government totally failed to put in any evidence of an essential element (money or property deprivation) of the charged crime (mail fraud), and under these circumstances the double jeopardy clause bars a second mail fraud trial. *Jackson v. Virginia*, 443 U.S. 307, 316 (1979) (defendant is entitled to an acquittal unless government proves *every* element of the offense beyond a reasonable doubt).

The hypothetical posed by the government (Opp. Mem. at 4, n. 3), has no resemblance whatsoever to this case, because there the second trial would be for completely different conduct, the murder of B, a different individual. Here, the government is seeking to retry petitioners under the exact same criminal statute for the exact same conduct. Thus, a much more analogous example would be an effort to retry the defendant for the murder of A. Suppose, for example, that the initial conviction was reversed on the grounds that A was not an "official" federal agent at the time of the murder. Could the government then reindict the defendant for the same murder of A, based on some new theory, unsupported by any evidence at the first trial, that A was an "unofficial"

[1]The prosecution is not even required to *disclose* its theories prior to trial, let alone plead its theories in the indictment. *See, e.g., United States v. Gabriel*, 715 F.2d 1447, 1449 (10th Cir. 1983); *United States v. Lawson*, 688 F. Supp. 314, 315 (S.D. Ohio 1987).

federal agent? Surely the double jeopardy clause would prohibit this.[2]

The government attempts to distinguish all of the conflicting cases cited by petitioners (and by the Fifth Circuit) on the sole basis that none of these cases reviewed the sufficiency of the evidence after reversing a conviction because the indictment "failed to charge an offense." However, there are plenty of cases that have done so. For example, in *United States v. Fitapelli*, 786 F.2d 1461 (11th Cir. 1986), the Eleventh Circuit first reversed the defendants' convictions because the indictment did not sufficiently charge the "flow theory" of Sherman Act jurisdiction. 786 F.2d at 1463. Then, for double jeopardy purposes, the court reviewed the evidence and held there was "insufficient evidence of jurisdiction under the (uncharged) flow theory," *id.* at 1464, which is the exact same type of inquiry the government now contends would be "pointless." *Accord, United States v. Holcomb*, 797 F.2d 1320 (5th Cir. 1986) (evidentiary sufficiency reviewed after reversal of Mann Act convictions for failure of indictment to allege all of the essential elements of the crime).

Furthermore, this Court in *Montana v. Hall*, 481 U.S. 400 (1987), a case relied on by the government in its opposition, expressly noted the evidentiary sufficiency requirement in cases where the government seeks retrial after a conviction is reversed due to a defective indictment. In *Hall*, the indictment was invalid because it pleaded the wrong statute. The Court held that retrial was permissible because there was "no suggestion that the evidence introduced at trial was insufficient to convict respondent."

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[2]A rule permitting the government to evade the double jeopardy clause simply by recasting its "theory" of the crime would encourage prosecutorial abuse. The prosecution would virtually be *encouraged* to experiment and indict only on the most expansive legal theories, on which it is the easiest to obtain a conviction, because the defendants could always be reindicted and retried on a more conservative and limited theory if the expansive theory proves to be legally invalid. And there would be *no limitation* on the number of times the government could narrow or recast its theory so as to subject the defendants to multiple trials.

481 U.S. at 403. Had the evidence been insufficient, retrial clearly would have been barred by double jeopardy.[3]

For all of these reasons, the Fifth Circuit did not accept the government's contention that evidentiary review should not be granted because the first indictment was defective and the second one is based on a different "theory."[4] The Fifth Circuit relied exclusively on the proposition that *Richardson* precludes an evidentiary review, and the correctness of this conclusion is the issue now before this Court.

Since the filing of our petition for certiorari, another federal circuit court has rejected the Fifth Circuit's view that *Richardson* prohibits a review of evidentiary sufficiency after a reversal of a conviction on other grounds. Reaffirming its "longstanding rule," the Ninth Circuit held:

> Under *Richardson*, it appears that appellate courts are not *required* to consider sufficiency issues. . . . [But] we find nothing in *Richardson* which *prevents* appellate courts from assessing the sufficiency of the evidence if they so wish.

United States v. Bishop, 959 F.2d 820, 829 n. 11 (9th Cir. 1992).

It is apparent that the various circuit courts have developed radically different interpretations of *Richardson*, and that action by this Court is needed to ensure a fair and uniform procedure that will preserve defendants' double jeopardy rights without unduly burdening the government. This case is an appropriate opportunity for this Court to resolve the conflict.

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[3]*United States v. Kozminski*, 821 F.2d 1186 (6th Cir. 1987), *aff'd*, 487 U.S. 931 (1988), is also instructive. There, this Court held that the theory charged was invalid. However, because and only because the Court found the evidence to be sufficient under a valid theory, retrial was permitted. 487 U.S. at 953. *See* 821 F.2d at 1193. The defendants in this case deserve at least that same consideration, especially where the government does not even argue that the crime of mail fraud was proven.

[4]The government's argument on this point is based entirely on *United States v. Davis*, 873 F.2d 900 (6th Cir.), *cert. denied*, 493 U.S. 923 (1989) (with White and Blackmun, JJ., dissenting from denial of certiorari). The Fifth Circuit opinion at issue here does not even mention *Davis*.

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CIRCUIT CONFLICT ON WHETHER A DEFENDANT MAY BE RETRIED ON A THEORY OF CRIMINAL LIABILITY THAT THE PROSECUTION ABANDONED FOR STRATEGIC REASONS AT THE FIRST TRIAL

In response to our argument that the prosecution's abandonment of the "money or property" theory at the initial trial bars a new trial on that theory, the government asserts that this claim is contrary to *United States v. Ball*, 163 U.S. 662 (1896), and *Montana v. Hall*, 481 U.S. 400 (1987). But *Ball* and *Hall* are not at all like petitioners' case. There was no suggestion in either of those cases that the government failed to prove a crime under *any* valid theory. In *Ball*, the indictment was defective simply because it neglected to specifically allege the time and place of a murder. *Hall* was a situation where the indictment cited the wrong statute.

The present case does not involve the formal or clerical errors at issue in *Hall* and *Ball*. Here, it is undisputed that the first indictment was worded as it was purely as the result of a volitional, strategic decision by the prosecution. Instead of using "adequate preparation and foresight" to avoid subjecting the defendants to more than one trial, *Grady v. Corbin*, 110 S. Ct. 2084, 2095 (1990), the prosecution opted to put all of its eggs in the "good government" basket. These prosecutors could have at least presented the jury with a "money or property" theory in the alternative, but for tactical reasons they decided to abandon the property theory and to rely exclusively on the invalid "good government" theory.

Thus, there is no meaningful distinction between the prosecutorial choice at issue here and the conduct that resulted in a double jeopardy bar to retrial in *United States v. Cavanaugh*, 948 F.2d 405 (8th Cir. 1991) (no retrial on abandoned "separate assault" theory). And of course, as both the government and the Fifth Circuit concede, this case is identical to *United States v. Slay*, 717 F. Supp. 689 (E.D. Mo. 1989), and *United States v. Gray*, 705 F. Supp. 1224 (E.D. Ky. 1988), where the government was denied a second chance to prove mail fraud after *McNally*-based reversals of the initial convictions.

There clearly is division and confusion in the courts on the question whether, and when, a tactical decision by the government that prejudices the defendant constitutes an "abandonment" for double jeopardy purposes.[5] This is an important and recurring issue that warrants review by this Court, and nothing in the government's opposition suggests otherwise.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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[5]The government's contention that petitioners "waived" their double jeopardy rights by successfully arguing that their first indictment was invalid is totally foreclosed by *Burks v. United States*, 437 U.S. 1, 17 (1978) (defendant does *not* waive his right to judgment of acquittal based on double jeopardy by "seeking a new trial as one of his remedies"), and *Green v. United States*, 355 U.S. 184, 191-92 (1957) (it would be "wholly fictional" to say that defendant waives his double jeopardy defense by successfully appealing conviction on lesser charge).